

¹ Application For Hearing of August 29, 2006.

both lower extremities at work while lifting a child. She also alleges she then sustained additional injury by overcompensating for those initial injuries while continuing to work. Finally, claimant maintains her back symptoms are from an altered gait she developed following the November 2005 accident and her right upper extremity symptoms are from using a cane following the accident.

The ALJ granted claimant medical benefits for her right upper extremity, back, and right knee. Respondent and its insurance carrier maintain the ALJ erred by finding claimant injured her right upper extremity and back in an accident that arose out of and in the course of her employment. They contend claimant's back complaints are from the natural aging process and her right upper extremity complaints are from an intervening injury to her cervical spine. They also argue the ALJ erred by awarding claimant additional medical treatment for her right knee as that treatment is for her preexisting condition rather than any injury she sustained at work. Accordingly, respondent and its insurance carrier request the Board to deny claimant's requests for medical treatment.

Claimant requests the Board to affirm the March 15, 2010, Order. She asserts the ALJ's decision is well-founded and supported by the medical evidence. She also argues that under the fourth edition of the *AMA Guides*, a doctor may testify about whether an alleged factor could have caused or contributed to an impairment but the doctor should not testify as to whether such factor actually did cause or contribute as that is a non-medical determination. Accordingly, claimant contends the Board should disregard Dr. Pat Do's opinion that her right upper extremity complaints are "not related to the work related injury of April 11, 2005 [sic]".²

The issue before the Board on this appeal is whether claimant has established the present need for medical treatment to her back, right upper extremity, and right knee is related to her November 2005 injury.

FINDINGS OF FACT

Having reviewed the entire record compiled to date, the undersigned Board Member finds and concludes:

Claimant was employed by respondent as an early childhood teacher. On November 14, 2005, claimant experienced pain in both knees when she stood from a kneeling position while lifting a child. Claimant, who was 52 years old at the time, continued to work despite worsening symptoms in her left knee and, consequently, developed increased pain in her right knee. She testified that before her incident at work, she had little, if any, symptoms in her knees.

² Claimant's Brief to the Board at 4.

After seeing another doctor in late 2005, claimant was referred by respondent or its insurance carrier to Bruce R. Buhr, M.D., for treatment of her left knee. Dr. Buhr first saw claimant in early January 2006 and determined claimant had a fairly extensive medial meniscus tear, a lateral meniscus tear, lateral joint space narrowing, a Baker's cyst, and a cyst on the tibial plateau. The doctor believed the medial meniscus tear could have been acute but the other problems were more degenerative in nature. When claimant's left knee pain did not resolve, Dr. Buhr performed an arthroscopy that included a partial medial and lateral meniscectomy, lateral compartment chondroplasty, and medial femoral condyle chondroplasty. Before that surgery, the doctor told claimant she would probably need a knee replacement to address the degenerative problems in her left knee.

In late May 2006, claimant reported pain in her left ankle, right knee, and back, all of which she thought was due to being "off balance."³ Despite those complaints and ongoing left knee pain and the knee giving way, Dr. Buhr released claimant in mid-June 2006 to return to work without restrictions. The doctor, however, suggested that claimant change jobs.

Claimant, at her attorney's request, was examined in September 2006 by Pedro A. Murati, M.D. The doctor noted claimant's left knee surgery and further diagnosed her as having bilateral patellofemoral syndrome, right knee pain secondary to overuse, and probable deep venous thrombosis in the left lower extremity, all of which he related to the November 2005 incident at work.

The ALJ conducted the first preliminary hearing in this claim in October 2006. Following that hearing, the ALJ authorized John P. Estivo, D.O., to treat both of claimant's knees and also ordered the payment of temporary total disability compensation.

Claimant first saw Dr. Estivo, an orthopedic surgeon, in November 2006. Claimant told the doctor about her November 2005 incident at work and how she had favored her left knee and experienced increased pain in her right knee. In addition to noting claimant's earlier left knee arthroscopy, Dr. Estivo diagnosed right knee pain and advanced degenerative joint disease in the left knee. Dr. Estivo concluded claimant had received all the medical treatment for her left knee that was necessary to treat her November 2005 injury. The doctor emphasized that further treatment of claimant's left knee should be provided by claimant's private insurance. On November 17, 2006, Dr. Estivo wrote in pertinent part:

In terms of the treatment to her left knee as it is related to the 11/14/2005 injury, her treatment to the left knee in my opinion has been complete. The meniscal tears that occurred when she squatted down and kneeled have been addressed with a knee

³ P.H. Trans. (October 17, 2006), Cl. Ex. 4.

arthroscopy. The advanced degenerative joint disease to her left knee that clearly developed over many years is not at all related to the 11/14/2005 injury date and should be treated through her private insurance outside of workers' compensation. It is true that ultimately she may require a knee replacement in the future, but this would not be cause of the injury that occurred on 11/14/2005. I have shown her the x-rays. I have explained to her that this is a very advanced degenerative process that has taken many years to develop. This was not caused by the 11/14/2005 injury. The arthritis to her left knee should be treated under her private insurance. I would recommend steroid injections, followed by Synvisc injections, and if she has no benefit with that treatment then I would recommend she consider a knee replacement, but again this should be under her private insurance as it has nothing to do with her 11/14/2005 injury date. In terms of her right knee, I would recommend a right knee MRI. I would relate her right knee complaints to the 11/14/2005 injury date in that she had to favor her left knee and further aggravated her right knee. She states she did injure her right knee initially, but it was much less than her left knee. Her right knee has continued to bother her consistently now. . . . I would recommend she pursue further treatment for her left knee under her private insurance as the arthritis is what is causing her symptoms now to the left knee. As far as the left knee is concerned, I would find her left knee to be at maximum medical improvement, as it relates to the 11/14/2005 injury date. . . .⁴

Dr. Estivo has not testified and his office notes do not specifically address whether the arthritis in claimant's knees was aggravated, accelerated, intensified, or otherwise affected by the November 2005 incident at work. The doctor makes it abundantly clear, however, that the arthritic condition was not caused by the incident at work.

In December 2006, Dr. Paul S. Stein, a neurological surgeon, examined claimant at the request of respondent and its insurance carrier. The medical report generated as a result of that examination indicates claimant told the doctor that before November 2005, she had some occasional aching in the left knee but she did not seek medical treatment and she would occasionally take ibuprofen. Dr. Stein concluded the only definitive treatment for the left knee was total joint replacement, which was due to the degenerative process in her knee rather than the incident at work. The doctor, however, did indicate he could not rule out that claimant may have aggravated her preexisting degenerative disease process in the incident at work. Dr. Stein wrote in part:

Ms. Donovan sustained injury to the left knee on 11/14/2005, with the pathology most likely being meniscal tear superimposed upon preexisting degenerative disease. She has undergone surgery for the left knee. The surgery for meniscal tear is related to the acute injury of 11/14/2005. Some of the procedure was directed toward degenerative disease which was preexisting, although I cannot rule

⁴ P.H. Trans. (August 28, 2007), Cl. Ex. 2.

out some element of aggravation. The predominant reason for the surgery was related to the work injury.

The patient reports right knee discomfort to a much lesser degree than the left. There is no record of complaints regarding the right knee that I could find in the treatment records for this injury. Examination of the right knee is benign except for a click which is not likely related to this injury. While it is possible that Ms. Donovan has some discomfort in the right knee since this injury occurred, there is no evidence, within a reasonable degree of medical probability and certainty, to document impairment to the right knee as a result of the work incident of 11/14/2005.

No definitive treatment exists for the [left]⁵ knee except total joint replacement, which may ultimately be necessary, and which will be related to the degenerative process, not the incident at work. SYNVISIC injections or steroid injections can be done for whatever temporary benefit they may provide. These are again related to the degenerative process.⁶

In early February 2007, Dr. Estivo performed a right knee arthroscopy, which included a chondroplasty to the medial femoral condyle, resection of patellofemoral plica, and a partial lateral meniscectomy. In April 2007, the doctor released claimant without restrictions from treatment of her right knee. Nevertheless, he continued to recommend treatment of her left knee, but under her private insurance.

In December 2006, the ALJ appointed orthopedic surgeon Daniel J. Stechschulte, Jr., M.D., to perform an independent medical examination to evaluate claimant's left knee. The doctor examined claimant in early March 2007 and diagnosed, among other things, that claimant had severe, preexisting osteoarthritis in her left knee that was exacerbated by her alleged work injury. Nonetheless, the doctor also concluded that claimant had reached maximum medical improvement for the injury she sustained at work and that any additional medical treatment for her ongoing left knee pain should be pursued under her own insurance as that pain was from her preexisting arthritis. Dr. Stechschulte's March 9, 2007, medical report indicates claimant denied having any problems with her knees before the incident at work.

Meanwhile, claimant continued to limp and her low back pain increased. As indicated above, she initially reported low back pain to Dr. Buhr's office in May 2006. During 2007, claimant received medical treatment for her back and radiating pain complaints, primarily from her personal doctor, Ronald M. Varner, D.O., and an orthopedic specialist, Camden Whitaker, M.D. Claimant was diagnosed as having lumbar radiculitis

⁵ Dr. Stein identified the correct knee in a followup report dated December 12, 2006. See P.H. Trans. (August 28, 2007), Resp. Ex. 1.

⁶ P.H. Trans. (August 28, 2007), Resp. Ex. 1 (Dr. Stein's report dated December 6, 2006.)

and degenerative disc disease and received injections, pain medications, and therapy. The medical records indicate that in February 2007, claimant began having rather severe low back pain, which increased with walking. The office notes from Milton H. Landers, D.O., dated August 31, 2007, provide the following history:

Ms. Donovan suffers from low back pain radiating into the right lower extremity to the heel. She notes the distal lower extremity is worse than the proximal lower extremity; however, there is numbness in the proximal right lower extremity. She rates the pain as an 8/10 and notes that she has suffered from this since February of 2007 without an inciting incident. She describes the pain as shooting with occasional weakness and numbness as above. It increases with walking, decreases with nothing.⁷

There appears no dispute that respondent and its insurance carrier were not providing the medical treatment that claimant obtained for her low back.

When respondent and its insurance carrier balked at providing claimant additional medical treatment for her knees, a second preliminary hearing ensued. At that hearing, which was held in August 2007, respondent and its insurance carrier questioned whether the medical treatment that Dr. Estivo had recommended for claimant's knees was related to the injuries claimant sustained at work or, instead, related to the preexisting arthritic condition in her knees. Claimant did not testify.

Following the August 2007 hearing, the ALJ requested George G. Fluter, M.D., to perform an independent medical evaluation and provide an opinion whether claimant's November 2005 accident aggravated, accelerated, or intensified claimant's preexisting degenerative condition in her knees. After reviewing claimant's medical records and examining her in early November 2007, the doctor concluded claimant's underlying arthritic condition was aggravated and made symptomatic by the work injury and its related medical treatment. Dr. Fluter wrote, in part:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Ms. Donovan's current condition and the reported injury of 11/14/05 and its sequelae.

Although arthritic changes develop over time, a specific injury occurred resulting in a lengthy course of diagnostic testing and treatment including right and left knee arthroscopic procedures. The underlying condition was aggravated and rendered symptomatic as a result of the injury and subsequent course.⁸

⁷ P.H. Trans. (January 15, 2009), Cl. Ex. 2.

⁸ *Id.*, Cl. Ex. 6 (Dr. Fluter's report dated November 7, 2007, at 8).

Dr. Fluter noted in his report that claimant was not working and that after March 2006, she had been on medical leave of absence. The doctor also noted in his November 2007 report that claimant had pain across her lower back and into her buttocks and legs.

After receiving the doctor's report and conferring with counsel, the ALJ awarded claimant continuing medical treatment for her knees, including a total left knee replacement.⁹ Claimant first saw John R. Schurman, II, M.D., in early March 2008, and in June 2008 the doctor performed a total left knee replacement.

Claimant continued to request treatment for her back problems, which she attributed to an altered gait she had developed after the incident at work. Consequently, respondent and its insurance carrier referred claimant to Dr. Estivo to evaluate her back. The doctor examined claimant in late October 2008. He related claimant's low back symptoms to her incident at work. Dr. Estivo noted, in part:

Considering the length of time this individual was dealing with her knee problems, I do believe that this certainly would have lead [sic] to an extended period of time of an altered gait. This could certainly have then resulted in a strain to her lumbar spine. She has had extensive testing including a diskogram to the lumbar spine. She certainly does not require any lumbar spine surgery. Her MRIs are basically showing normal age-related changes. She may have a soft tissue strain here that I would relate to the injury claim of 11/14/2005. In my opinion, the lumbar spine strain then would be related to her 11/14/2005 injury claim in that she has had an altered gait due to her ongoing knee problems.¹⁰

Dr. Estivo also commented in his report that claimant needed no additional medical treatment for either her low back or her knees.

To further complicate the situation, on December 9, 2007, another driver lost control on an icy road and struck the car in which claimant was riding. Dr. Varner's office notes indicate claimant saw him the next day with complaints of headaches, neck pain, and low back pain. The doctor diagnosed traumatic cervical myofascitis. At a followup visit on January 18, 2008, in addition to claimant's neck pain, the doctor noted claimant was having "some neuropathic pain in her right arm which is compatible with ulnar neuropathy, which is a new feature since the motor vehicle accident."¹¹ Dr. Varner diagnosed ulnar neuropathy and indicated it was related to claimant's neck.

⁹ Order dated February 1, 2008.

¹⁰ *Id.*, Resp. Ex. 1 (Dr. Estivo's October 24, 2008, report at 5).

¹¹ *Id.*, Cl. Ex. 1 (Dr. Varner's January 18, 2008, report).

When Dr. Varner saw claimant in May 2008, he suspected claimant had carpal tunnel syndrome. But those symptoms became less important as claimant underwent her total left knee replacement in June 2008. But at a followup visit with Dr. Varner in early September 2008, the doctor noted claimant had undergone a nerve conduction study that revealed claimant had mild to moderate carpal tunnel syndrome. And on September 24, 2008, the doctor noted claimant was having paresthesias in her arms, with a positive Tinel's test on the right. Dr. Varner noted that physical therapy was in order but it needed to be approved by "workman's comp or auto insurance whichever it relates to."¹²

In October 2008, Dr. Varner wrote claimant's attorney and provided an opinion that it would appear medically reasonable to assume that the pain and paresthesia in claimant's right arm could have been caused or contributed to by her using a cane following her total left knee replacement. In a September 2007 letter to claimant's attorney, the doctor wrote that claimant's November 2005 injury at work "undoubtedly accelerated and aggravated her pre-existing degenerative condition in her left knee"¹³ and that the resulting altered gait aggravated and accelerated the degenerative process in her low back.

At a preliminary hearing in January 2009, claimant requested medical treatment for her right knee, right upper extremity, and her back. Claimant did not testify. Following that hearing, the ALJ appointed Pat D. Do, M.D., to examine claimant and provide his treatment recommendations.

Dr. Do, an orthopedic surgeon, examined claimant in late March 2009. The doctor has not testified but his report regarding his evaluation is in the record. At the time of the examination, claimant's chief complaints were low back pain radiating into the hips, bilateral knee pain, and right hand pain and numbness. The history Dr. Do recorded is somewhat different than that obtained by others. First, Dr. Do recorded that on claimant's date of accident, she lost her balance and fell down onto her knees when she began to stand up with the child. Second, the doctor noted that claimant was working when he examined her.

Dr. Do concluded in his initial medical report that claimant's right upper extremity complaints were not related to her accident at work; that her right knee symptoms were related to that incident; and that her back would be related to the incident if she had experienced back pain since then. He did not comment upon claimant's left knee as he

¹² *Id.*, Cl. Ex. 1 (Dr. Varner's September 24, 2008, report).

¹³ *Id.*, Cl. Ex. 1 (Dr. Varner's letter dated September 16, 2007).

had not been requested to do so. The doctor later responded to an inquiry by claimant's attorney and stated the following:

. . . if you were to believe the patient's statement that her right upper extremity complaints began after she started ambulating with the cane in her right hand since status post left total knee replacement, then it could be presumed that the carpal tunnel symptoms were at least aggravated by the use of the cane.¹⁴

In June 2009, at Dr. Varner's request, George L. Lucas, M.D., evaluated claimant's upper extremities. Dr. Lucas noted claimant had numbness particularly in her left hand and occasionally on the right. Dr. Lucas indicated claimant had significant carpal tunnel syndrome and he recommended a median nerve decompression, with the left side being done first.

Last but not least, Dr. Varner wrote claimant's attorney in November 2009 and advised that recent nerve conduction tests confirmed that claimant had mild to moderate right carpal tunnel syndrome and perhaps mild ulnar nerve entrapment, both of which were probably related to claimant's using a cane due to her ongoing lumbar and knee problems.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁶

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁷

¹⁴ P.H. Trans. (December 7, 2009), Cl. Ex. 1.

¹⁵ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

¹⁶ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁷ K.S.A. 2005 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”¹⁸

Considering the above evidence, the ALJ granted claimant’s requests for medical treatment of her right knee, right upper extremity and back. The undersigned Board Member agrees with regard to the right knee and back but not the right upper extremity. The evidence is fairly overwhelming that the incident at work aggravated the arthritis in claimant’s left knee, which, in turn, caused her to limp and develop symptoms in her right knee and back. In short, claimant did not have any significant symptoms in her knees until her incident at work. But following that incident, she developed pain that did not resolve and required a total left knee replacement. She has continued to limp and that has caused symptoms in her right knee and low back. The undersigned finds that the November 2005 incident at work aggravated the preexisting arthritis in her knees and is responsible for causing symptoms in her low back.

The undersigned finds, however, that claimant has failed to establish that her right upper extremity symptoms are related to the incident at work. Claimant did not testify at a number of the preliminary hearings that have been held in this claim. Accordingly, she has not testified about her right upper extremity symptoms, when they began, or how they were affected by the December 2007 car accident. Claimant has relied upon the information contained in her medical records and the various doctors’ opinions. While claimant’s personal doctor, Dr. Varner, has related claimant’s right upper extremity symptoms to her chronic use of a cane following her left knee replacement surgery, the fact remains that claimant did not develop right upper extremity difficulties until after the December 2007 automobile accident.

Dr. Do noted in his March 26, 2009, report that claimant’s right upper extremity problem was not related to her accident at work. While he did qualify that opinion in a letter dated April 23, 2009, it was only based on the premise that claimant’s right upper extremity complaints began after she began using the cane. That is not the case. Claimant experienced right upper extremity complaints immediately after the automobile

¹⁸ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

accident. This Board Member finds that claimant has failed to prove that the need for medical treatment for her right upper extremity stems from her work-related injuries.

Respondent and its insurance carrier do not challenge that a worker is entitled to benefits under the Workers Compensation Act when an accident at work aggravates a preexisting condition. When dealing with preexisting medical conditions, the test is not whether the accident at work caused or created the condition but, instead, whether the accident aggravated or accelerated the condition. The Kansas Supreme Court in *Strasser*¹⁹, wrote in pertinent part:

The workmen's compensation act prescribes no standard of health for workmen, and where a workman sustains an accidental injury arising out of and in the course of his employment he is not to be denied compensation merely because of a pre-existing physical condition, for it is well settled that an accidental injury is compensable where the accident serves only to aggravate or accelerate an existing disease or intensifies the affliction.²⁰

CONCLUSIONS

In summary, the undersigned finds claimant has established it is more probably true than not that her present need for medical treatment for her right knee and back are related to her accident at work and, therefore, the preliminary hearing Order should be affirmed in part but reversed with regard to the right upper extremity.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned finds the March 15, 2010, preliminary hearing Order should be affirmed in part but reversed with regard to claimant's right upper extremity.

¹⁹ *Strasser v. Jones*, 186 Kan. 507, 350 P.2d 779 (1960).

²⁰ *Id.*, Syl. ¶ 2.

²¹ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of July, 2010.

HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge